IN THE Supreme Court of the United States

October Term, 1951
No. 373

FRED STROBLE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S BRIEF.

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Statement of Case.

On November 22, 1949, an information was filed in the Superior Court of the State of California in and for the County of Los Angeles charging petitioner with the murder of Linda Joyce Glucoft. [R. 1.] On November 25, 1949, petitioner was arraigned and the Public Defender was appointed to represent him. [R. 325.] Thereafter petitioner moved to set aside the Information under Section 995 of the Penal Code. After taking testimony and hearing argument on the motion the same was denied. Petitioner then entered a plea of not guilty and not guilty by reason of insanity; whereupon the court appointed Dr. Robert E. Wyers, Superintendent of the Norwalk State Hospital, and Drs. Edwin E. McNeil and Victor Parkin as experts to examine petitioner. [R. 292-293.] Trial of petitioner commenced on January 3, 1950, resulting in

a verdict by the jury of Murder in the First Degree on petitioner's plea of not guilty. He then waived trial by jury and his plea of not guilty by reason of insanity was tried by the court, and he was adjudged sane. Thereafter John D. Gray, petitioner's present counsel was substituted in place and stead of the Public Defender. [R. 299-300.] Numerous continuances were then granted for counsel to familiarize himself with the record. A motion for new trial and a motion in arrest of judgment was then made. After taking testimony and hearing argument both motions were denied. [R. 314-369.] Thereafter judgment of the extreme penalty was imposed. [R. 369-370.] On appeal to the Supreme Court of California the judgment was unanimously affirmed. (*People v. Stroble* (1951), 36 Cal. 2d 615.)

On October 8, 1951, this Court granted the petition for Writ of Certiorari. [R. 426.]

Statement of Facts.

Linda Joyce Glucoft, a six year old child, lived with her parents across the street from the Hausman family in a residential section of the City of Los Angeles. The Hausmans, too, had a six year old child, Rochelle, and the two children were playmates. [R. 15.]

On November 14, 1949, about 3:45 P. M., Linda left her mother, saying she was going to play with Rochelle. At that time, as part of her clothing, she was wearing panties. [People's Ex. 10.] It had been Linda's habit to return to her home about 5 P. M. On this day she did not return and at about 5:30 P. M. the police were notified and the search for Linda started. [R. 17.]

In the early morning of November 15, 1949, the body of Linda was found behind the incinerator of the Haus-

man home, wrapped in a blanket [People's Ex. 3] and covered with paper and wooden boxes. [R. 17.] Detective W. H. Brennan arrived at the scene at about 6:50 A. M. He saw Linda's body wrapped and concealed as above described; and an ax [People's Ex. 9] was standing upright against the incinerator. A knife [People's Ex. 6] was stuck in a pile of lumber near the incinerator. An ice pick [People's Ex. 7] was in the garage on a shelf and a ball peen hammer [People's Ex. 8] was behind a pile of wood. The panties, which had been worn by Linda [People's Ex. 10] were found in the incinerator in a torn condition. [R. 18, 19, 20.]

On the day the body was found an autopsy was performed. The cause of death was found to be asphyxia due to strangulation. [R. 25.] A necktie [People's Ex. 4] was wound twice around the neck of the child. In additional to a mass of contusions and abrasions, the autopsy surgeon found the following: In the back of the neck there was a deep laceration which extended deep into the neck and passed between the sixth and seventh cervical vertabrae lacerating the spinal cord. [R. 33.] The external genitalia showed irritation. The right chest showed two small puncture wounds. [R. 34.] In the left back was another puncture wound. [R. 36.] In the right parietal bone was a depressed fracture. In the left occipital area there was another depressed fracture. [R. 38.] There were four linear fractures of the occipital bone extending throughout the back of the head. [R. 39.] The abrasions and discolorations on the child's back could have been caused by the butt end of an ax. [People's Ex. 9; R. 40.] The lacerations immediately above the fractures in the child's temple area could have been caused by the ball peen hammer. [People's Ex. 8; R. 41.] The

wound in the back of the neck which severed the spinal cord could have been caused by the knife. [People's Ex. 6; R. 41.] The three puncture wounds found on the child's chest and back could have been caused by the ice pick. [People's Ex. 7; R. 42.] The irritation of the child's private parts could have been caused by fingering on the afternoon of November 14, 1949. [R. 42-43.] In the opinion of the doctor all the wounds, with the exception of the deep laceration in the back of the neck, were inflicted upon the child while the child was still alive. [R. 43-45.]

The petitioner, who is the father of Sylvia Hausman and the grandfather of Rochelle, was at the home of the Hausmans on November 14, 1949, the day the child disappeared, having spent several days there. At about 2:30 P. M. of that day Rochelle returned home from school and her mother prepared to take the child to a party, both leaving the house between 3:30 and 4 P. M. Before leaving, Sylvia Hausman instructed petitioner that she would phone him and give him certain instructions pertaining to the preparation of the evening meal. The petitioner remained at the home alone. [R. 5.] In addition to Rochelle, the Hausmans had a young son, Fred, who shared a bedroom with Rochelle, each child sleeping on a single bed. On a dresser in this bedroom was a tie rack. When Mrs. Hausman left her home the knitted tie [People's Ex. 4], which she had previously bought for Fred, was on this rack [R. 8], and the blanket [People's Ex. 3] was on Fred's bed. The knife [People's Ex. 6] was in the kitchen, as was the ice pick [People's Ex. 7] and the ball peen hammer. [People's Ex. 8; R. 10.] The ax [People's Ex. 9] was customarily kept in the garage. [R. 11.] Some time after 4:30 P. M. of

that day, she phoned the house at least twice, but received no answer. She returned to her home at about 6 P. M. and found the petitioner gone. However, his clothes were still there. [R. 14.]

Stroble had, on many previous occasions, molested female children [R. 156-157, 163], and at the time of the murder of Linda was a fugitive from justice, having jumped bail on a charge of molesting young girls. [R. 110, 121-122.] On occasions he used the Hausman home to "hide out." [R. 165.] Suspicion was immediately focused on petitioner and as a result "one of the most publicized and extensive manhunts in California history was begun." (See p. 5 Petition for Writ of Certiorari.)

On the morning of November 15, 1949, between 1:30 A. M. and 2 A. M., Stroble entered a hotel at Ocean Park, a beach resort within the City of Los Angeles, asked for a room, registered under the name of Frank J. Hoff, and gave an address which was fictitious. [Rep. Tr. on Appeal, pp. 34-40.] The clerk who rented the room to Stroble detected no alcoholic odor on his breath and stated positively he was sober. Stroble remained at this hotel for three nights, leaving on the morning of the 17th, between 6 and 7 A. M. [Rep. Tr. on Appeal, p. 41.] About noon on November 17, 1949, Stroble was arrested.

The Technical Director of the Scientific Crime Investigation Laboratory of the Los Angeles Police Department, whose qualifications were unquestioned [R. 47] made an examination of Stroble's fingernails and the clothes he was wearing at that time. Previously, this witness had examined the scene where the child's body was discovered. [R. 49.] This witness found blood under the fingernails of petitioner's left hand. On the right trouser cuff of the pants worn by Stroble were a series of

human blood stains. [R. 49.] Material which was found on the blanket [People's Ex. 3], in which the child's body was wrapped, was compared with the debris found in the cuffs of Stroble's trousers. Both contained portions of compound needles from cypress trees and grass leaves. Cypress trees overhung the fence adjacent to the incinerator where the child's body was discovered. [R. 50-51.] The head portion of the ax [People's Ex. 9] was contaminated with human blood and hairs. The hairs were microscopically similar to the hairs on the deceased child's head. [R. 53.] The knife [People's Ex. 6] and the ice pick [People's Ex. 7] were similarly examined and both were found contaminated with human blood. Additionally, on the knife [People's Ex. 6] was a single strand of hair, which on examination proved similar to the hair on Linda's head. [R. 53.]

Within an hour after petitioner's arrest he was brought to the Office of the District Attorney. There, in the presence of nineteen people, petitioner made a complete confession. [R. 81-138.] This confession was reported by five stenographers operating in relays [R. 81] and recorded on a wire recorder that was started five minutes before Stroble entered the room and, with the exception of some short breaks, was kept in continuous operation until the confession was completed. [R. 143.]

The substance of his confession is as follows:

He was born in Austria in 1881 and came to the United States in 1901. [R. 81-82.] We worked as a baker for 21 years, but has not worked since 1946. He knew Linda (deceased) a couple of years. [R. 84.] That Linda came to Rochelle's house every day and the children would play in the back yard. [R. 85.] That on Monday, November

14, he came to the Hausman house at about 2 o'clock P. M. and his daughter, Mrs. Hausman, was in bed. [R. 89.] About that time Rochelle came home from school. Mrs. Hausman sent him on an errand to buy some ribbon to tie up a box. [R. 90.] About 3:15 P. M., Mrs. Hausman and Rochelle left the house to go to a party, leaving petitioner at home alone. [R. 91.] He had a couple of drinks then Linda came into the house. He gave her a chocolate bar and Linda asked for Rochelle. [R. 92-93.] He took her into the "kid's" bedroom where he kissed and squeezed her. He tickled her with his finger and she said "That's not nice." He then put his finger inside her vagina and "she didn't like it." She again asked for Rochelle and wanted to go out, whereupon he threw her on the bed. She didn't like that and started to scream. [R. 95.] While on the bed he put his hand under her dress and his finger in the vagina. He got on top of her "lay on her and make believe you know." She started to holler and wrestle away. He held her down. [R. 96.] "All she wanted to get away from me—I was laying on top of her. Then—we had been playing there lots of times. Some way, you know, my nature works that way. You know if I just touch anybody like that, who I like—at that time, soon as they start undressing—and she don't want to give in and all. Then she want to start to holler and when this happened, I got ahold on her throat." He squeezed until she became quiet. He got up and she started squirming around and became wild again. [R. 97.] He looked around and saw some neckties behind the dresser. He took three or four steps to get the necktie. She then was pretty tired out and hurt pretty bad. To make sure she wouldn't come back he put the necktie around her neck and tied it. [R. 98.] He thought she was dead so he

went to the kitchen and got a couple of drinks. He figured the child was dead five or eight minutes after he got his hand on her.

When he went out to the kitchen she started moving around and "I didn't know what the hell to do." He took a hammer from the kitchen drawer, took her off the bed and wrapped her in a blanket. [R. 99.] He knew she was not dead. He then hit her on the temple with the hammer because "This is a very sensitive part, see—this is one of the most particular spots in the body—she couldn't live any longer because it is impossible." [R. 100.] However, when he hit her with the hammer she "kinda" moved. He then got scared that she was still alive. While wrapped in the blanket, he dragged her through the house and across the back yard to the incinerator. He could not leave her in the room as people were always coming in and he dragged her out that way "in case somebody look over the fence—so many people passing by and nobody would see me." He was not sure she was dead so he returned to the kitchen, got an ice pick, and went back to where the child was. He felt for her heart and then pushed the ice pick into her, once in front and he thought twice in the back. He wanted to be sure he got the heart and she wouldn't suffer. [R. 101.]

He then went to the garage, placed the ice pick on a shelf and got an ax. He figured the damage is done so he might as well finish it. He then hit the child over the head a couple of times. [R. 102.] He used the flat metal part of the ax and hit her on the backbone also.

He hit her four or five times and put the ax at the side of the incinerator. He then returned to the kitchen and got a knife. [R. 103.] The blade was about two inches wide. He then returned to the child and stabbed her in the neck in the back. He wanted that spot because "I tell you how this came to my mind. I saw when I was in Mexico, when they got through in a bull fight, well, bulls are already dead and they go there, that's the last 'thing' he does, is take a short knife about that long (indicating), goes over there and throws that knife right behind the neck there, but that's final." [R. 104.] He then came back into the house and saw the child's panties in the bedroom. He placed them in the incinerator. [R. 108.] He covered the child's body with boxes so they won't notice it right away. He returned to the house, adjusted the flame under the potatoes and left for Ocean Park. [R. 106.] He registered at a hotel, using the name and address of some man who had given him a card. He did that because he knew if he used his right name he wouldn't be there two hours. The law would pick him up. [R. 124.]

He came downtown today (day of arrest) because "I want to give myself up this afternoon. That is why I went downtown. I wanted to call up my daughter and then Van de Kamp (his former employer) and the police department." He had been reading the newspaper accounts of the murder, but he was relaxing and walking around freely as the sooner they would pick him up the better it would be for him. [R. 125.] He knew he was up against it even if he let her go. He wouldn't be out of the house and have the whole neighborhood after him. [R. 137.]

Summary of Argument.

It is respondent's position that Stroble was not denied due process of law and in support of this contention has set forth herein the reasons. The entire record is the best evidence that due process was not denied. Under the circumstances of this case Stroble was fairly tried and properly convicted and none of the grounds relied upon by Stroble affected the result of his trial or made the trial itself unfair.

I.

Defendant Was Not Denied Due Process and Was Properly Convicted After His Guilt Was Demonstrated and No Newspaper Reports Contributed to the Guilty Verdict.

There is very little in the record relative to any newspaper reports. Naturally, the finding of the child's body mangled, mutiliated and violated could be expected to receive widespread newspaper attention resulting in notorious widespread public excitement and revulsion. In fact, it was by reason of this widespread publicity that petitioner was detected and apprehended. The murder had been committed on November 14, 1949, and the trial of petitioner did not commence until January 3, 1950, and the verdict of guilty was returned on January 19, 1950.

A criminal action in the Superior Court can be removed from the court in which it is pending on one ground only; that the defendant cannot have a fair and impartial trial in the County (Sec. 1033, Penal Code). The application for removal must be made in open court and in writing, verified by the defendant (Sec. 1034, Penal Code).

If any newspaper account of the commission of the crime here in question did, in any way, prejudice Stroble's right to a "Fair and impartial trial" in Los Angeles County, there was a remedy available to him. At no time did he make an application for the removal of his case nor did he ever urge in the trial court that he was in anywise prejudiced at his trial by any newspaper accounts.

At Stroble's motion for a new trial he urged that: "I urge that the defendant was deprived of the presumption of innocence by the premature release by the District Attorney's office of the details of the confession."

In support of his motion for a new trial, he offered, and there were received as exhibits, several newspapers in which the account of the crime was printed. There was no affidavit or evidence introduced to show that any juror read or considered these newspaper articles in arriving at their verdict.

The Supreme Court of California said in *People v. Stroble* (1951), 36 Cal. 2d 615, 621, that there is no indication that the jury based their verdict on the newspaper accounts of the statements rather than upon the evidence, and that the case should not be reversed because of mere speculation that the jury might unconsciously have been improperly influenced adversely to defendant in the performance of their duties by the newspaper accounts.

It was not until after the petitioner was found guilty of murder and found to be sane that this question of newspaper publicity was injected into the case. This was done

on petitioner's motion for a new trial, at which time the following occurred:

"Mr. Gray: Now, in further support of the motion under (fol. 1233) Subdivision 6, I urge that the defendant was deprived of the presumption of innocence by the premature release by the District Attorney's office of the details of the confession; and in support of this, your Honor, I offer at this time the 10 Star Edition of the Daily News, dated Thursday, November 17, 1949; the Sunrise Edition of the Los Angeles Examiner of Friday, November 18, 1949; the Sunset Edition of the Los Angeles Evening Herald and Express, Thursday, November 17, 1949; and Pages 1 and 2 of the Los Angeles Times, Home Edition, Friday, November 18, 1949.

The Court: We will mark those exhibits double AA in one group.

Mr. Gray: Your Honor is no doubt familiar with the headlines and contents of those newspapers.

The Court: Well, the answer to the proposition is rather obvious; if you have finished the presentation of this question—the jurors were all thoroughly examined and all definitely stated that they would give to the defendant the benefit of the presumption of innocence. To say he was deprived of it because of a newspaper, or all newspapers—all newspapers have published matters concerning the case—is wholly untenable and wholly illogical. There is nothing to show those jurors ever saw those papers or ever read those papers. They were fully examined, so far as defense counsel desired as to any knowledge

or information they might have of the case. They were instructed as to the (fol. 1234) doctrine of reasonable doubt, and there is one presumption that does apply here and it is presumed the jury followed the law. As a matter of fact, there was no defense offered to the murder charge here whatsoever. The only thing in the nature of a defense which was offered was the legal argument as to whether it was a murder of the first or of the second degree, and the argument upon the hypothesis of first degree murder, as to which of the two penalties should be imposed." [R. 361-362.]

During the selection of the jury, the jurors were questioned concerning whether or not they had a fixed opinion of the petitioner's guilt and thorough inquiry was made by defense counsel as to whether or not the jurors had read the newspaper accounts of the killing. The record contains the *voir dire* examination of one prospective juror who later was accepted by both sides. He was asked if he had read or heard anything about the case and answered, "I have;" he was asked if he had formed anything like a fixed opinion and answered, "None at all."

"The Court: In other words, if you were accepted on this jury you would start out, we will say, from scratch, absolutely impartial?

Mr. Kalbfuss: That is right.

The Court: You are willing to listen to the evidence on both sides, and to decide the case according

to the evidence as you hear it in the court room and the Law of California?

Mr. Kalbfuss: That is right.

The Court: Counsel may inquire." [R. 294.]

Counsel for petitioner then questioned Mr. Kalbfuss and counsel was apparently satisfied that petitioner would receive a fair trial regardless of the previous newspaper publicity given to the case because counsel did not pursue the subject further than that brought out by the Court as above set forth.

Complaint is made that newspapers of November 21, 1949, carried the complete question and answer text of petitioner's confession. The record reveals that on November 21, 1949, the preliminary hearing of petitioner was held and in open court the entire confession was read as part of the evidence offered by the prosecution. This is the identical confession which petitioner complained was released by the District Attorney on November 18th. The confession having been offered in evidence became a matter of public record; as such the newspapers had a right to publish this confession. It is impossible to determine just how petitioner was prejudiced by the release of the confession by the District Attorney when, within a matter of three days, the entire confession was published by such newspapers as part of a public record. The evidence of petitioner's guilt was ample and there is no indication whatsoever that the petitioner was convicted because of any inflammatory reports of the crime appearing in the newspapers.

II.

Petitioner's Confession to the District Attorney Was Made Freely and Voluntarily and Its Use in Court Was Not in Violation of the Due Process Clause.

Under this point the petitioner states that the uncontradicted testimony in the record sets forth a clear cut example of a coerced confession to the District Attorney. The basis for this statement is that in the 70 minute period between his arrest and the time of the confession, a police officer waved a blackjack under petitioner's nose and kicked him in the shins, and a uniformed park officer in the presence of said police officer slapped the petitioner in the face.

Before the confession taken in the District Attorney's office was read in the evidence, the defense conducted a *voir dire* examination as to the voluntary character of the confession and called as a witness Mr. Miller, who caused Stroble's arrest.

Mr. Miller, a driver of a laundry truck, testified that he observed Stroble enter a bar and directed the attention of Carlson, a uniformed police officer, to Stroble. Miller saw Carlson pull Stroble off the bar stool and search him. Miller then accompanied Carlson and Stroble to the foreman's office in Pershing Square Park. There Carlson called his office reporting Stroble's arrest and then stood Stroble up, facing the wall, and Stroble put his hands up against the wall (illustrating). [R. 75.] Miller saw Carlson kick Stroble's feet out so that he would be off balance while the officer searched him. Two or three

times Stroble put his feet forward and Carlson kicked them back, striking the side of his shoe against the toes of Stroble. Miller testified:

"Q. You say his shoe slipped up in the kicking process and got him on the shin? A. It is possible. I cannot say for sure.

By the Court: Q. You don't know whether that happened or not? A. It is hard to remember things like that." [R. 76-77.]

Waiting the arrival of the homicide officers, Miller saw Carlson hold up his sap stick and he asked Stroble if he had ever seen one of these. Stroble made no reply and Carlson put it away. "That is all there was." Miller saw the Park Foreman slap Stroble with his open hand and knock his glasses off. [R. 77-78.] In answer to questions by the Court, Miller testified that the slap occurred three or four minutes after Stroble had been searched and while he was seated. The Court then asked, "Can you give us any apparent cause for it?" (the slapping), and the witness Miller replied, "I asked Stroble at one time if he was guilty of what he was accused and he mumbled something under his breath that sounded like 'I guess I am' and then it was after that he was slapped." [R. 79-80.]

Officer Carlson testified he had his attention directed to Stroble by Miller. Stroble was at that time drinking beer in a bar. Carlson placed Stroble under arrest and took him to the office of a park superintendent in a park immediately across the street from this bar. Stroble was searched by Carlson, who called the homicide bureau and, after the arrival of the homicide officers, Stroble was brought to the Wilshire Police Station where he was

turned over to Officers Brennan and Tullock, the investigating officers. [R. 54-55.]

On cross-examination Carlson testified that other than asking petitioner his name and giving him instructions during the search, he had no conversation with Stroble; that at the foreman's office no other member of the police department was present. The only persons present were Stroble, Carlson, the foreman and two other park employees, who left almost as soon as Carlson got to the office. Carlson testified that he did not strike Stroble or inflict any kind of physical injury on him. Carlson admitted having a blackjack on him, but did not recall showing it to Stroble. [R. 55-57.]

Dr. Marcus Crahan, a witness called by petitioner, testified he gave Stroble a physical examination on the afternoon of the day of petitioner's arrest; that he observed petitioner's feet and shins and saw no bruises of any kind on them. [R. 159-160.]

Detective Brennan testified that he first saw Stroble at the Wilshire Station on November 17, 1949, at about 12:30 P. M., as Stroble and Officer Carlson were coming up the stairs leading to the station house. Then, Brennan, Tullock, Stroble, and Carlson were joined by Captain Harry Didion and they entered an automobile. Carlson, Stroble and Brennan got in the back seat and Eliott and Didion got in the front seat. They immediately left for the District Attorney's office. At no time while Stroble was in the custody of these officers did he ask to communicate with any member of his family nor did he ask to communicate with a lawyer and, specifically, he did not ask to see Attorney John Gray or telephone John Gray. [R. 57-59.]

In the automobile on the way to the District Attorney's office, Sergeant Brennan had a conversation with Stroble that he made no promises to him of any reward or extended any hope of immunity to him and that he did not use force or threats of any kind whatsoever and that the statements made to him by Stroble were free and voluntary. Brennan testified that:

> "When we first got into the car, we rode along about, I would say eight or ten blocks and the defendant Stroble (fol. 136) was seated between Officer Carlson and myself. I turned to the defendant and I said, 'How do you feel, Fred?' and he said, 'Oh, I feel okay.' I said, 'Where did you go?' He said, 'Well, after that terrible thing happened,' he said, 'I went down to the beach, down to Ocean Park. I was going to do away with myself.' I said, 'What do you mean by that terrible thing?' He said, 'when the little girl got killed.' I said, 'Do you mean when you killed the little girl?' He said, 'Yes.' He said, 'I was going down to the beach. I was going to jump in the ocean and commit suicide, but I decided I would have to pay on the other side so I may as well come back and pay on this side.' At this time I asked him what he intended to do when he came back, and he said, 'Well, I wanted to call Mr. Anderson and Mr. Rodehouse'—I believe, but I have forgotten the other name, but anyway it was the superintendent of the Helms—or rather the Van de Kamp's Bakery. He wanted to call those up before he gave himself up. He said, 'I went into the cafeteria—or the restaurant—to get a glass of beer. I thought I would get a glass of beer and then I would call upon them and then I would call the police up and give myself up.' That was about the extent of the conversation." [R. 61-62.]

Following the *voir dire* examination of Miller and Chief Thad Brown, Stroble renewed his objection that no proper foundation had been laid as to the free and voluntary character of the confession made to the District Attorney and the objection was overruled. [R. 80.]

Chief Brown testified that Stroble was brought into the office of the District Attorney on November 17, 1949, about fifteen minutes after Brown arrived there. Numerous officers and the members of the District Attorney's office were present. No force or threats were used against the petitioner nor were any promises of reward made or hope of immunity extended to Stroble. Stroble's statements were free and voluntary. Brown observed four or five girls working in relays taking stenotype notes of the conversation. [R. 62-63.] The entire conversation, from beginning to end, was recorded on a wire recorder. [R. 64.] The statement started about 12:58 P. M. and was concluded at about 3 P. M.

Throughout the questioning by a Deputy District Attorney, Stroble was seated to the right of the District Attorney who was seated behind his desk. The stenotype operators were seated to the right of Stroble. [R. 139.] Several breaks were taken to give Stroble an opportunity to rest and when changes of stenographers would be made, he was asked several times if he desired to rest before resuming the questioning. [R. 140.] (When transcribed the questions asked of and the answers given by Stroble consisted of 62 pages of single space typing [R. 273.])

Brown further testified that during the questioning of Stroble he was asked if anybody hit or slapped or kicked or threatened to hit or slap or mistreat him and to each of said questions he answered in the negative. When

asked if he had any complaints at all the way the officers had treated him, he answered, "No, nothing at all. Wonderful." [R. 128.] Stroble stated that he thought Officer Carlson had treated him all right and that as far as he knew none of the police officers who brought him to the District Attorney's office had abused him. [R. 127.] When Stroble was asked if he had freely and voluntarily told about the case, Stroble replied: "Everything what is. Nothing I go back. I want to give myself up anyway, but I was ready for the jump over; then I thought I cannot get away from punishment, because I paid the other side. Might as well as pay here too. That was my opinion, that's why I came down." [R. 128.]

Mr. David E. Brownson, a radio technician investigator in the office of the District Attorney, testified that he was in the office of the District Attorney on November 17, 1949, and present during the entire time that Stroble's statement was taken. In the District Attorney's office was a Webster Model 180 Wire Recorder and a microphone on the District Attorney's desk. [R. 142.] This machine recorded all of the conversation of Mr. Stroble and those who questioned him. This recording machine was started at 12:50 P. M. and approximately five minutes later Stroble entered the office. The statement of Stroble was concluded and the machine was stopped at about one minute after 3 P. M. [R. 143.] Brownson testified that no force or threats of force or any promises were made to Stroble and all Stroble's answers were free and voluntary. [R. 146.] Brownson testified that there was absolutely no change of any kind in the recording, except that due to a break in the wire, about six words were eliminated. No material was transposed; nothing was added, nothing was taken away and there was no dubbing. [R. 147.]

The original recording in its entirety was played for the jury.

In an effort to prove that Stroble did not have the mental capacity to form the intent necessary to commit murder in the first degree and thus reduce the crime to murder in the second degree, Stroble called several experts.

Dr. Crahan was called by Stroble and his attorney, Mr. Matthews, asked Dr. Crahan: "Did he relate to you that he had murdered a girl? A. Yes, he did." [R. 157.]

On cross-examination of Dr. Crahan, Stroble's witness, Crahan testified, among other things:

> "He managed to push her back to the bed and took off her panties, but as he started to play with her she screamed. This scream incidentally frightened him terribly and he thought of this act's danger if he was apprehended, in view of the police charges against him. He placed his hands around the child's throat to stop her screaming and held it there until he realized she was unconscious. Not certain that she was dead, he went to get a necktie and garrotted his victim."

Dr. Crahan further testified that Stroble told him he went to the kitchen and brought back a hammer and hit the child on the head with this hammer several times. Still not certain she was dead he went back to the kitchen and got an ice pick with which he stabbed her through the heart. Not convinced that she was dead and not suffering, he then went back to the garage and brought an ax with which he struck the child at the base of the spine and once over the neck.

> "It was then that he thought of a bull fight that he had seen in Mexico and of a small dagger used at the

kill and again returned to the kitchen to get a short knife which he attempted to plunge into the back of her neck, but was unable to puncture the neck more than approximately one half inch." [R. 165-166.]

Stroble also called as his witnesses, Dr. Jacob Peter Frostig, who examined Stroble on December 31, 1949 [R. 188-189]; Mr. Carl Palmberg, a clinical psychologist [R. 198]; and Dr. Victor Parkin, who examined Stroble on December 22, 1949. [R. 217-220.] A reading of the testimony of these witnesses called by Stroble will reveal that the statements made to them by Stroble as to the killing of the child were substantially the same as those made in the District Attorney's office and to Dr. Marcus Crahan.

Dr. Edwin E. McNeil examined Stroble on December 14, 1949 [R. 214] and Dr. Robert E. Wyers examined Stroble on December 11 and on December 18, 1949. [R. 221-222.] These doctors were appointed by the court to examine Stroble and were called by the people and a reading of their testimony discloses that Stroble's statements to them were substantially the same as made to the District Attorney and the other doctors above referred to.

On the morning of November 18, 1949, at about 10 A. M., Stroble was brought before the magistrate and arraigned and the magistrate appointed the City Public Defender to represent him for the purpose of the preliminary hearing. [R. 275-276.] At the arraignment Deputy District Attorney John Barnes gave a copy of the complete statement taken from Stroble on the previous day at the District Attorney's office to the Public Defender. [R. 275.]

The record reveals that John D. Gray, Stroble's present attorney, consulted with Stroble on the night of November 17, 1949. [R. 180.] Thus it appears that the statements made by Stroble to Dr. Frostig, Mr. Palmberg, Dr. Parkin, Dr. Wyers and Dr. McNeil, were made after consultation with Attorney Gray and after he was arraigned before the magistrate and after he was arraigned for trial in the Superior Court. We may add that Mr. Matthews, Stroble's trial counsel, who had full and complete knowledge of all the facts, and who was present at all stages of the trial, addressed the jury at the close of the case in the following manner:

> "Mr. Matthews: I don't know, ladies and gentlemen, as I told you on *voir dire*, what more a human being can do than come forward say I did this terrible thing, and here is how I did it. I don't know why I did it. I can't believe I did it, but here it is. Do you give this man no credit for his confession? Where there is no duress used by the state, don't you give him any credit? Isn't that an indication of something by way of rehabilitation? What more could you do, if you committed a terrible crime, than Fred Stroble did, in attempting to expiate it?" [R. 299.]

Furthermore, after the jury returned its verdict of guilty of murder in the first degree, a discussion was had in chambers of the trial judge. All counsel were present, including Mr. Cuff, the public defender and his deputy, Mr. Matthews. Mr. Cuff was addressing the judge and relating a conversation he had with Mr. Matthews on a previous occasion, relating to a conversation that Matthews

told him he (Matthews) had with Dr. McNeil, and the following transpired:

> "Mr. Cuff: * * * However, getting back to the conversation with Mr. Matthews, he said he talked to Dr. McNeil. I said what did you say? He said I told him we were at a standstill [fol. 1281] that we had confessions from Stroble; that he would confess to anybody that would talk to him; that we couldn't stop him from making confessions to the doctors or anybody else; * * *." [R. 388.]

In this case the court, after hearing all the evidence relating to the manner of obtaining Stroble's confessions, determined that sufficient foundation had been laid for their admission. The evidence was then presented to the jury and the question as to their character, whether voluntary or involuntary, was submitted to the jury by the court's instructions. [R. 1-4.] From the record here presented, we may assume that both court and jury found that all confessions were free and voluntary.

This Court has reversed convictions because of the admission of confessions elicited after intensive questioning by relays of officers for hours a day over periods of days, as illustrated in *Watts v. Indiana* (1949), 338 U. S. 49 (69 S. Ct. 1347, 93 L. Ed. 1801); *Turner v. Pennsylvania* (1949), 338 U. S. 62 (69 S. Ct. 1352, 93 L. Ed. 1810); *Harris v. South Carolina* (1949), 338 U. S. 68 (69 S. Ct. 1354, 1357, 93 L. Ed. 1815). Other cases could be cited.

In *Snyder v. Massachusetts* (1933), 291 U. S. 97 (54 S. Ct. 330, 78 L. Ed. 674, 90 A. L. R. 575), it is stated:

> "Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an abso-

lute concept. It is fairness with reference to particular conditions or particular results." (U. S. S. Ct. p. 116.)

"The law, as we have seen, is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof. But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." (U. S. S. Ct. p. 122.)

The reasoning of Mr. Justice Cardozo, in the *Snyder* case, *supra*, is applicable to the instant case, when he said:

"A fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts of the Fourteenth Amendment a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all to reasons that brought the rule into existence." (U. S. S. Ct. p. 114.)

Respondent does not agree with the label "coerced" placed upon the confession by Stroble made to the District Attorney. There is no evidence Stroble was kicked on the shins by anybody at any time. There is evidence that at the office of the park foreman, the arresting officer kicked Stroble's toes with the side of his shoe; that the

officer waved his blackjack under Stroble's nose; that after Miller, not an officer, asked Stroble if he is guilty, and Stroble mumbled, "I guess I am," then the park foreman slapped Stroble's face once with his open hand. The slap was an unfortunate and unforeseen incident done by a person who was not connected with the police department. At no time did the arresting officer, Carlson, question Stroble concerning the details of the murder or seek a confession from him. There is nothing in this record that would indicate that anything done by the arresting officer or anyone else at the time of Stroble's arrest, operated on his mind and induced him to make his confession later to the District Attorney. Stroble did not testify at the trial, and when asked in the District Attorney's office "Have you got any complaints at all the way the officers have treated you?" He replied: "No, nothing at all. Wonderful." [R. 128.]

In *Lisenba v. California* (1941), 314 U. S. 219, 86 L. Ed. 166, it was established by the evidence that the petitioner had been repeatedly and persistently questioned at intervals during the period from April 19 to April 21. During that time he was slapped once by one of the officers conducting the questioning, and he made no confession. However, on May 2nd he did confess. The Supreme Court held that the use of his confession at the trial did not constitute a violation of the due process clause.

Under the record here presented, Stroble was not denied due process of law by the admission of his confession in evidence at his trial. The Supreme Court of California stated in the case of *People v. Stroble* (1951), 36 Cal. 2d 615, at 617, that:

> "We have concluded that defendant was fairly tried and properly convicted."

III.

Stroble Was Not Denied Effective Aid of Counsel.

Petitioner asserts that he was denied the effective aid of counsel at a key point in the course of the trial at the behest of the trial judge. He states that from the time of arraignment to the appeal he had four counsel consecutively and at least two of them, at various stages of the proceedings, demonstrated a sincere concern for the protection of all his rights; that at one or more vital stages in the proceedings, no one of the four counsel represented him effectively.

Stroble concedes that he was arraigned in the Superior Court in the State of California, in and for the County of Los Angeles, and that "* * * The County Public Defender was appointed as his counsel and Deputies Public Defender Matthews and Hill assigned to the case." (Pet. Br. p. 2c.)

Stroble concedes also that "* * * the Deputy Public Defender, Al Matthews, during the course of the jury trial on the murder charge conducted the defense with energy and diligence, and the confidence engendered by his work is attested to in the words of the petitioner on the motion for new trial. Nor is there any question that petitioner was under the impression that Matthews was his attorney and the person on whom he relied for counsel and advice.". (Pet. Br. pp. 23-24.)

Stroble states that the record reveals that with the exception of Deputy Public Defender Hill's participation in the argument to the jury, Hill was not considered by either the court or Stroble to be "the effective counsel" for Stroble. This statement is not supported by the record.

The record throughout reveals that Mr. Hill was a very "effective counsel" in protecting Stroble's rights. Throughout the trial Mr. Hill interposed objections to questions asked on direct examination; entered into stipulations; cross-examined the people's witnesses; called and examined witnesses for the defendant; moved to set aside the information [R. 266]; was present and took part at defendant's arraignment [R. 292-294]; and, among other things, accepted the jury as constituted for the trial. [R. 299.]

Mr. Gray, Stroble's present attorney, in presenting his motion for a new trial [R. 314], moved the court to modify the judgment and find the defendant guilty of a lesser degree, of second degree murder, "* * * and in support of the motion under this subdivision, I invite the court's attention to masterful argument of Mr. Hill in this regard." [R. 320.]

In *People v. Stroble* (1951), 36 Cal. 2d 615, 620, the Supreme Court referred to Mr. Hill, one of Stroble's counsel, as the "(Veteran Deputy Public Defender John J. Hill.)" and the court also stated "During the trial of the issue of not guilty Deputies Matthews and Hill of the Public Defender's office handled the defense in the court room." (P. 628.)

Stroble contends that Mr. Cuff, the Public Defender, was not his counsel and therefor had no right to inject himself into the case.

The honorable trial judge made this statement:

> "When a Public Defender in a county is appointed to defend, it is the Public Defender who is counsel just exactly as the District Attorney is counsel for the People, and the delegation as to who shall be the

particular person to represent the client or who shall represent the (fol. 1176) People is left to the head of that office." [R. 323.]

Mr. Cuff testified as a witness in behalf of the People on Stroble's motion for a new trial and stated that he is the Public Defender of Los Angeles County and the Stroble case came to his office by assignment from the Superior Court. [R. 325.] Cuff visited Stroble and advised him that he, Hill and Matthews worked night and day on the case [R. 327]; that virtually every evening all the testimony and evidence was gone into, and Mr. Cuff made a complete survey of the proposed testimony to be adduced on the plea of not guilty by reason of insanity. [R. 329-330.] Mr. Cuff testified that having all the available evidence on this issue, Mr. Cuff felt that the plea of not guilty by reason of insanity was futile and felt justified in even withdrawing the plea of insanity entirely. [R. 333.]

A Public Defender appointed to represent a defendant accused of crime becomes the attorney for said defendant to the same extent as if regularly retained by him. (*In re Hough* (1944), 24 Cal. 2d 522, 528-531.)

The Supreme Court of California stated:

> "This court can take judicial notice, too, that it would be difficult to find in California any lawyers more experienced or better qualified in defending criminal cases than the Public Defender of Los Angeles County and his staff." (*People v. Adamson* (1949), 34 Cal. 2d 320, 333.)

In the favorable light that the Public Defender's office is looked upon by the courts of California, we shall look to the record to ascertain if Stroble was "denied effective

aid of counsel" at any "key point" in the course of the trial.

It is Stroble's contention that the "key point" at which he was not represented by counsel occurred at the time when Stroble waived a jury trial and submitted the matter to the court for decision on his plea of not guilty by reason of insanity. The record does not support this contention.

After Stroble was found guilty by a jury of murder in the first degree and at the commencement of the hearing on his plea of not guilty by reason of insanity, the trial court called the attorneys into chambers and requested the Public Defender, Mr. Cuff, to be present. In chambers, with all counsel present, the court accused Mr. Matthews of loud talking in the presence of the jury while presenting an offer of proof at the bench, and also with other conduct which the court stated was unprofessional conduct. [R. 371-393.]

At the conclusion of the discussion in chambers, the court reconvened and Mr. Matthews stated to the court that his offer of proof had been completed and asked for a recess until 2 o'clock. [R. 225.]

At 2 o'clock court was called to order and the judge stated "Record shows counsel and the defendant present." [R. 225.] Then, Mr. Hill stated to the court that he had information conveyed to him that Stroble desired to withdraw the case on the second issue now before the court on the plea of not guilty by reason of insanity, waiving a jury trial, and that that issue be tried by the court without a jury. In open court, Stroble answered twice that that is correct. The record shows all parties waived a jury. [R. 225-226.]

After the above procedure a stipulation was entered into that the court, sitting without a jury, may determine the issue of not guilty by reason of insanity upon the testimony that had theretofore been heard on the general issue and the court could consider as evidence in the case the reports filed by the psychiatrists. [R. 226.]

The court, after hearing and considering the evidence, presented under the stipulation, found Stroble sane. [R. 303, 370.]

Under the record here presented, Stroble was not denied the effective aid of counsel nor due process of law.

> "Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial." (*Betts v. Brady* (1942), 316 U. S. 454, 464, 86 L. Ed. 1595, 1602.)

Considering the "totality" of the evidence and the participation of Stroble's counsel, the Public Defender and his deputies, from the moment of their assignment up to the time that present counsel, Mr. Gray, was substituted for them in this case, the record demonstrates that Stroble was well, ably and diligently represented by experienced counsel at every stage of the proceedings.

And, we may add, that the Public Defender had the authority to enter into a stipulation pertaining to the submission of the evidence above referred to on the insanity issue. This stipulation was made in Stroble's presence and fully understood by him. (*People v. Wilson* (1947), 78 Cal. App. 2d 108, 119-120.)

IV.

Each Particular Aspect of the Procedure Leading to Conviction, Considered Separately or Together Would Not Invalidate the Conviction.

Stroble states that "The question before this court can only be decided from a consideration of the whole course of the proceedings and cannot be decided by the presence or absence of any single factor." With this statement, Respondent agrees.

1. Delay in Arraignment.

The Supreme Court of California in *People v. Stroble* 1951), 36 Cal. 2d 615, at 624-627, gave the subject here under discussion extended consideration. The court, among other things, states:

> "'Defendant's first two confessions (one made in the district attorney's office and one made shortly thereafter to the County Jail physician), were obtained during a period when rights of defendant under the state Constitution and Penal Code were being flagrantly violated."

Neither the Supreme Court of California, nor the petitioner in his brief in this case, mention Stroble's confession to Sergeant Brennan in the automobile on the way to the District Attorney's office. We have set forth this confession and the circumstances under which it was made under Point II of this brief. There is nothing in our law which requires that the defendant, even though in the custody of officers, must be given any advice by the officers before making the confession. (*People v. Hoyt* (1942), 20 Cal. 2d 306, 314.)

In the *Stroble* case, *supra*, the Supreme Court said:

> "Theoretically, taking defendant promptly before a magistrate and permitting Mr. Gray to consult with defendant immediately upon his arrival at the district attorney's office, might have been of considerable importance to defendant on his subsequent trial . . . As the situation actually developed, however, it became obvious that defendant did not wish, or was not able to remain silent. After he had consulted with Mr. Gray and with attorneys from the public defender's office defendant continued repeatedly to make detailed confessions. Each of these confessions appears to be an attempt by defendant, to the best of his ability, to recount the entire truth as to the killing, including his state of mind at the time. In these circumstances the violation of his constitutional and statutory rights immediately after his arrest appears not to have affected the outcome of defendant's trial." (P. 626.)

The Supreme Court of the United State has said:

> "So far as due process affects admission before trial of a defendant the accepted test is their voluntariness. This requires appraisal of the facts of each particular case open to consideration by the Court." (*Gallegos v. Nebraska*, U. S. Sup. Ct. L. Ed. Adv. Op. (Dec. 17, 1951), Vol. 96, No. 3, p. 82.)

From an appraisal of the facts in this case the trial court and the State Supreme Court found that the delay in bringing Stroble before a magistrate did not violate due process.

2. There Was No Violation of Due Process in Refusing to Permit Gray to Consult Defendant in the District Attorney's Office.

Gray testified upon the motion to set aside the information that he came to the District Attorney's office at 2:42 or 2:43 P. M. on the afternoon of Stroble's arrest. [R. 281-283.] The District Attorney completed taking Stroble's statement at about 3:00 P. M. on the same day. [R. 143.] At the trial, some weeks later, Gray testified that he was mistaken as to the time of his arrival at the District Attorney's office and that it was at 1:43 P. M. [R. 176.]

On the night before Stroble's arrest, at the police station and at the home of Hausman, Stroble's son-in-law, Gray told five witnesses [R. 206, 207, 208, 209] that he "does not and will not represent Stroble in the murder case, that his client is Hausman and he just wants to satisfy himself that Stroble committed the murder." [R. 206.]

Following the confession in the District Attorney's office, on the same day, Gray said to Mr. Roll, Chief Deputy, that he did not represent Stroble; that the Hausmans had heard that Stroble confessed and "he was there just to find out from Stroble if this was true." [R. 199.] Gray told Mr. Barnes, Assistant District Attorney, "He said he just wanted to see Mr. Stroble and ask him whether or not he committed the murder in order to re-

port to Mr. Hausman, because he had been instructed by Hausman that if Stroble had done that [fol. 780] murder, he, Hausman, wanted absolutely nothing to do with him." [R. 204.]

On cross-examination of Gray he testified that he did state that he did not represent Stroble on the murder charge and under no circumstance would he represent him on the murder charge. It was Gray's recollection that he said that after Stroble had been apprehended. [R. 181, 186.]

Whatever conflict there is in the evidence as to whether or not Gray was Stroble's attorney on the murder charge at the time of his arrest or confession was a question of fact. Under the Constitution of California the trial court is the constitutional arbiter of the ultimate facts in issue and the reviewing court cannot substitute its own findings in lieu thereof. (*People v. Pruitt* (1942), 55 Cal. App. 2d 272, 275.)

Assuming that Gray was Stroble's counsel at the time of his arrest on the murder charge, and Gray was denied the oportunity to consult Stroble in the District Attorney's office, it does not follow that Stroble's conviction was offensive to the common and fundamental ideas of fairness and right.

> "As applied to a criminal trial, denial of due process is the failure to observe the fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the

acts complained of must be of such quality as necessarily prevent a fair trial." (*Lisenba v. California* (1941), 314 U. S. 219, 86 L. Ed. 166.)

Under all the facts and circumstances of this case, and in view of the fact that Stroble did not request the presence of Gray, or any other attorney, on the day he was arrested and confessed, it does not appear that the outcome of his trial was in anywise affected. The Supreme Court of California held that:

"We have concluded that defendant was fairly tried and properly convicted." (*Stroble, supra,* p. 617.)

3. The Admission Into Evidence of the Confession Exacted While in the District Attorney's Office Was Not a Denial of Due Process.

Under Point II of this brief we have presented our views on the subject here discussed. There is no need for us to repeat what has been said, other than to point out that the case of *McNabb v. U. S.,* 318 U. S. 332, cited by petitioner, was considered by this Court in *United States v. Carignan* (1951), U. S. Sup. Ct., L. Ed. Adv. Ops., Vol. 96, No. 2, p. 57, wherein, among other things, this Court stated:

"Another extension of the McNabb rule would accentuate the shift of the inquiry as to admissibility from the voluntariness of the confession to the legality of the arrest and restraint. Complete protection is afforded the civil rights of an accused who

makes an involuntary confession or statement when such confession must be excluded by the judge or disregarded by the jury upon proof that it is not voluntary. Such a just and merciful rule preserves the rights of accused and society alike. It does not sacrifice justice to sentimentality. An extension of a mechanical rule based on the time of a confession would not be a helpful addition to the rules of criminal evidence. We decline to extend the McNabb fixed rule of exclusion to statements to police or wardens concerning other crimes while prisoners are legally in detention on criminal charges."

4. There Was No Coerced Confession Used.

Under Point II of this brief we have presented our views on this subject.

5. The Prosecution Inspired Publicity.

This subject is answered under Point I of this brief.

6. The Substitution of Counsel.

This subject is answered under Point III of this brief.

In addition to what we said under Point III, we would add that Stroble's trial was not offensive to the concept of due process; the defendant had the effective aid of counsel; his counsel performed his full duty intelligently and well. The entire record is the best evidence that due process was not denied. (*Avery v. Alabama* (1939), 308 U. S. 444, 446-447, 84 L. Ed. 377; *Betts v. Brady* (1942), 316 U. S. 455, 86 L. Ed. 1595.)

Conclusion.

When the record is examined relative to the matters complained of, either singly or collectively, and the opinion of the Supreme Court of California is considered, we submit that no rights guaranteed by the Fourteenth Amendment to the Constitution of the United States were violated and the judgment should stand.

Respectfully submitted,

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Service of the within and receipt of a copy thereof is hereby admitted this.....day of February, A. D. 1952.

2-29-52—55